TEO KIAN CHUN v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
HAS ZANAH MEHAT JCA
[CRIMINAL APPEALS NO: J-05(M)-281-05-2018, J-05(M)-282-05-2018, J-05(SH)-286-05-2018 & J-05(SH)-287-05-2018]
27 JULY 2020

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons found guilty and convicted for trafficking in dangerous drugs and having poison in possession – Drugs and poison found in bag at airport – Accused persons sentenced to imprisonment and death – Defence that bag did not belong to accused persons – Whether defence probable – Whether failure to adduce full CCTV footage of incident detrimental to prosecution's case – Whether conviction and sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, s. 39B(1)(a) – Poisons Act 1952, s. 30(3) – Penal Code, s. 34*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons found guilty and convicted for trafficking in dangerous drugs – Trial judge invoked double presumptions under s. 37(d) and 37(da) of Dangerous Drugs Act 1952 – Whether gave rise to real risk that accused persons may be convicted of drug trafficking in circumstances where reasonable doubts remained – Whether there was serious misdirection by trial judge – Whether conviction and sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, s. 39B(1)(a)*

The appellants were charged at the High Court for (i) trafficking in 227.19g of methylenedioxymethamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s. 34 of the Penal Code ('PC') ('first charge'); and (ii) having in their possession 1829.61g of fenazepam, an offence under s. 30(3) of the Poisons Act 1952 ('PA') read together with s. 34 of the PC ('second charge'). The prosecution's narrative revealed that (i) the second appellant was seen with, *inter alia*, a bag ('P27'), heading towards the check-in counter for departure at the Senai International Airport, Johor Bahru; (ii) the first appellant, who was with the second appellant, was not carrying anything; (iii) when P27 was scanned, the officer on duty ('SP5'), saw a suspicious-looking image in the bag; (iv) SP5 instructed that the bag be opened but the first appellant quickly took P27 and they both proceeded hastily out of the aero mall; (v) despite their resistance, the appellants were successfully arrested; and (vi) an examination on P27 revealed the presence of the incriminating drugs and poison that formed the subject matter of both charges. Satisfied that the prosecution had established a *prima facie* case, the trial judge called upon the appellants to enter their

defence. In their defence, the appellants submitted that (i) P27 did not belong to them but instead belonged to a woman standing in front of them; (ii) P27 was mistakenly taken as the scanning area was chaotic; (iii) the incident would be revealed if the whole CCTV was produced in court instead of only for the duration of two minutes; (iv) they did not resist during the arrest and were fully cooperative; and (v) they tried telling SP5 that they had mistakenly taken the bag but SP5 took no action. At the conclusion of the trial, the trial judge found the appellants' defence failed to rebut, on a balance of probabilities, the presumptions (i) under ss. 37(d) and 37(da) of the DDA for the first charge; and (ii) possession and knowledge, under s. 30(4) of the PA for the second charge. The appellants were found guilty and sentenced to (i) death for the first charge; and (ii) one year imprisonment for the second charge. Hence, the present appeal. In support of their appeal, the appellants submitted that the trial judge erred in (i) invoking both presumptions under ss. 37(d) and 37(da) of the DDA, at the same time ('double presumptions'); (ii) finding custody, control, knowledge and possession had been proven despite the break in the chain of evidence and suppression of material evidence; and (iii) finding the defence to be an afterthought.

Held (allowing appeal; setting aside convictions and sentences; and acquitting and discharging appellants from both charges)

Per Mohamad Zabidin Mohd Diah JCA delivering the judgment of the court:

(1) The use of double presumptions by the trial judge was a serious misdirection as it gave rise to a real risk that both the appellants may be convicted of drug trafficking in circumstances where reasonable doubts remained. Regarding the element of trafficking, since the trial judge invoked presumption under s. 37(da)(xvii) of the DDA to prove trafficking, there was no specific finding of facts made by His Lordship as to which of the act under s. 2 of the DDA the appellants had committed to constitute trafficking. There was also no evidence to prove both the appellants had acted in concert to traffic the drugs to warrant the calling of their defence for a charge of trafficking. Therefore, the appellants should not have been called to enter their defence for the charge of trafficking. The conviction of the appellants was not safe and the same, along with the sentence, for the offence of trafficking had to be set aside. (paras 40, 43 & 44)

(2) The importance of the CCTV footage was highlighted by the defence from the very beginning. The footage played during the course of the trial was only for the duration of two minutes. The omission of the relevant part of the CCTV footage showing the existence (or absence) of a woman placing a bag at the scene was material and the omission prejudiced the defence's case. If the full duration of the CCTV recording was produced, it might show that (i) there was indeed a woman who had placed her bags on the scanner; and (ii) the appellants had mistakenly

taken the wrong bag, which probably belonged to the woman, from the scanner. This would rebut any presumption of possession of the impugned drugs and the poison. Furthermore, if the prosecution wished the court to accept the version that the appellants were walking hastily towards the exit and resisted arrest, it would be reasonable to expect such CCTV footage showing the said arrest was tendered by the prosecution. (paras 49-51)

(3) The '*Alcontara* notice' is the furnishing of details in support of an accused's defence which is normally given in his or her cautioned statement. This may, or may not, involve the actual tendering of the cautioned statement itself in evidence. Once such a notice is given, an investigation must be carried out on the disclosure given and the onus is then shifted to the prosecution to rebut the '*Alcontara* notice'. When the appellants informed SP5 that they had picked up the wrong bag, which probably belonged to the woman who was in the same queue as them at the scanning machine, sufficient notice had been given to enable the investigating officer ('IO') to investigate the veracity of the defence. In fact, the IO had partially done so by obtaining the CCTV recording. It was unfortunate that he deemed it fit to leave out the crucial moments in the CCTV recording which could have either rebutted/supported the defence. The full duration of the CCTV recording would reveal that the woman either really existed or merely the appellants' creation. The defence version could not be characterised or dismissed as an afterthought. (paras 55, 56 & 58)

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(xvii), 37A
Federal Constitution, arts. 5(1), 8(1)
Poisons Act 1952, s. 30(4)

(Criminal Cases No: J-05(M)-281-05-2018 & J-05(SH)-286-05-2018)
For the appellant - Gopal Sri Ram, Hisyam Teh Poh Teik, Yasmeen Soh & Raveena Kaur Vessy; M/s Teh Poh Teik & Co
For the respondent - Mangaiarkarasi Krishnan; DPP

(Criminal Cases No: J-05(M)-282-05-2018 & J-05(SH)-287-05-2018)
For the appellant - K L Chee; M/s K L Chee & Co
For the respondent - Mangaiarkarasi Krishnan; DPP

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Trial No: 45A-43-12-2016 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Mohamad Zabidin Mohd Diah JCA:

Introduction

B **[1]** The appellant in Criminal Appeal No: J-05(M)-281-05-2018 and Criminal Appeal No: J-05(SH)-286-05-2018 was charged in the High Court together with the appellant in Criminal Appeal No: J-05(M)-282-05-2018 and Criminal Appeal No: J-05(SH)-287-05-2018. Both were charged with two charges and the amended charges against them read:

C 1st Amended Charge.

Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 4:15 petang di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai, dalam Daerah Johor Bahru, di dalam Negeri Johor telah mengedar dadah berbahaya iaitu Methylenedioxymethamphetamine (MDMA) seberat D 227.19 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

2nd Amended Charge.

E Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 4:15 petang di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai, dalam Daerah Johor Bahru di dalam Negeri Johor, telah didapati dalam milikan kamu racun iaitu Fenazepam seberat 1829.61 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 30(3) Akta F Racun 1952 (Disemak 1989) dan dihukum di bawah Seksyen 30(5) Akta yang sama dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

[2] At the conclusion of the trial, the learned High Court Judge ("learned trial judge") found both appellants guilty for both the charges. Both appellants were sentenced to death for the first amended charge. As for the G second amended charge, both were sentenced to one year imprisonment. Both appellants filed separate appeal for the separate charges. Hence these four appeals before us. On 29 July 2019, we heard all four appeals together and at the end of which we allowed the appeals and set aside the orders made by the learned trial judge. We now give our reasons.

H **[3]** For convenience, Teo Kian Chun will be referred to as the first appellant and Tan Hark Liang as the second appellant.

The Prosecution's Case

I **[4]** The prosecution's case as narrated by the learned trial judge was that on 24 May 2016 at around 4.15pm, the second appellant was seen bringing a black trolley bag with the brand "Lotus Master" and a white paper bag heading for the check-in counter for departure.

[5] At the time, the first appellant was with him but was not carrying anything. The second appellant placed the said bag into the scanning machine on the instructions of SP5 who was on duty there at the time.

[6] SP5 discovered that there was a suspicious looking image in the bag and asked both the appellants what was in the bag. The first appellant replied that it was only a hamper.

[7] Not satisfied with the reply from the first appellant, SP5 instructed that the said bag be opened. At that time the first appellant quickly took the said bag and hastily proceeded in the direction heading out of the aero mall. At the same time, the second appellant took the white paper bag and also proceeded hastily out of the aero mall.

[8] As both the appellants proceeded out of the aero mall, they were followed by SP5 who also sought the assistance of SP6 and SP8 to arrest the appellants. At that time, SP9 and his colleague from the Customs Department, SP7, also happened to be present and together with the auxiliary police, detained both appellants together with the said bag (P27).

[9] SP5, SP6, SP7, SP8 and SP9 who were involved in the arrest of the appellants testified that the first appellant was holding a trolley bag P27 while the second appellant was carrying a paper bag branded "Emporio Armani" and a carry bag branded "Mona Lisa". Both appellants were brought to the Branch Examination Office, "Pejabat Cawangan Pemeriksaan" at the Senai International Airport.

[10] An examination of the said trolley bag P27 revealed the presence of a number of pills which upon subsequent analysis by SP3, the chemist, was found to contain methylenedioxymethamphetamine (MDMA) weighing 227.19g and 9960 pills containing poison fenazepam weighing 1829.61g.

Finding Of The Trial Judge

[11] At the close of the prosecution's case, the learned trial judge found both the appellants were in custody and control of the said bag. The learned trial judge then invoked presumption under s. 37(d) of the Dangerous Drugs Act 1952 ("the Act") to impute knowledge and possession of the drug in the said bag which form the subject matter of the first amended charge.

[12] Since the weight of the drug seized was more than 50g, the learned trial judge then invoked s. 37(da) of the Act and found the prosecution had established a *prima facie* case for the charge of trafficking against both the appellants. The learned trial judge ordered both the appellants to enter their defence.

[13] Regarding the second amended charge, the learned trial judge found since both the appellants were in custody and control of the said bag, the statutory presumption of possession and knowledge under s. 30(4) of the Poisons Act 1952 applies ("Poisons Act"). Thus, the learned trial judge

found the prosecution had established a *prima facie* case for the second amended charge against both the appellants. The learned trial judge ordered both the appellants to enter their defence.

Defence

[14] During defence stage, both appellants testified by way of witness statements. The first appellant testified that second appellant called him on 23 May 2016 by phone and said that he wanted to meet him. When the second appellant arrived at Johor from Kuching on 24 May 2016, they met up at a Chinese restaurant in Johor Jaya at about 1pm. Their conversation centered on a few things and the second appellant requested the help of the first appellant to find a job for him.

[15] After the meal, the second appellant asked the first appellant to send him to Senai International Airport. The second appellant told the first appellant that he wanted to fly back to Kuching, Sarawak that very day itself. The first appellant then sent the second appellant to Senai International Airport in the first appellant's car. The first and second appellants arrived at Senai International Airport at about 4pm and the first appellant parked his car by the side of the road in front of the main entrance to the terminal.

[16] The first appellant then alighted from the car and accompanied the second appellant into the terminal building. The first appellant said that he saw the second appellant carrying three bags - one black trolley bag, one shoulder bag and one white paper bag. The first appellant did not carry any bags.

[17] Only at that time did the second appellant inform the first appellant that he had not bought a flight ticket yet. The first appellant was annoyed with the second appellant for not informing him of this earlier as he had parked his car by the side of the road and was afraid of receiving a summons.

[18] The second appellant then proceeded to the Air Asia ticket counter. At the counter, the person manning the counter informed the second appellant that tickets to Kuching, Sarawak were sold out. However, she suggested to the second appellant to go to the check-in counter and to register his name on the waiting list there if he still wanted to go back on that day. During this period, all three bags were in the care of the second appellant.

[19] The second appellant then proceeded to the Air Asia check-in counter to register his name on the waiting list while the first appellant followed him. To get to the check-in counter, the second appellant had to pass through a baggage scanner. As the second appellant did not have a ticket yet and only wanted to register his name on the waiting list, he walked right past the baggage scanner without scanning his bags. An auxiliary police officer then asked the second appellant where he wanted to go.

[20] Meanwhile, an auxiliary police officer manning the baggage scanner stopped the second appellant and instructed him to turn back and place his black trolley bag into the baggage scanner to be scanned. The second appellant without hesitation immediately turned back and placed his black trolley bag into the baggage scanner as instructed. After doing so, the second appellant then waited in line to pass through the baggage scanner area. The first appellant was beside the second appellant at that time.

[21] The second appellant had to wait in line because the line was held up by a Chinese woman in front of him. According to both the first and second appellants, the holdup was due to an auxiliary policeman inspecting a black bag belonging to the Chinese woman. The said Chinese woman had with her two black bags.

[22] Both appellants said that while the auxiliary policeman was inspecting the Chinese woman's bag, the second appellant's black bag was still inside the baggage scanner. The bag had not moved as the conveyor belt was stopped while the auxiliary policeman inspected the Chinese woman's bag.

[23] The conveyor belt started to move again after two Malay women behind the first and second appellants placed their bags inside the baggage scanner machine. The second appellant then received a phone call. At that time, the first appellant saw two black bags made their way out of the baggage scanner. According to the first appellant, when the two black bags came out of the baggage scanner, the Chinese woman was still at the front of the line, followed by the first appellant and the second appellant and finally the two Malay women.

[24] According to the first appellant, the line in front of the baggage scanner was a bit chaotic. When a black bag made it out from the baggage scanner, the first appellant saw that the second appellant was on the phone. The first appellant also saw the second appellant signal with his hands to him to help him with his bag as the second appellant was on the phone. The first appellant without hesitation then took a black trolley bag that had made its way out of the baggage scanner.

[25] The first appellant had spontaneously taken the black trolley bag, not realising that the black trolley bag was not the one belonging to the second appellant but to the Chinese woman instead.

[26] Immediately after taking the black trolley bag, the first appellant turned around and headed straight back to his car followed by the second appellant. The first appellant was understandably apprehensive as he had parked his car by the side of the road in front of the main entrance to the terminal as he had honestly believed that he would not take long to send the second appellant off.

[27] The first appellant honestly believed that he would park the car, accompany the second appellant to check in the latter's bags, send him off to the departure gate, and return back to his car and go home. Instead, because the second appellant had not purchased a ticket, it took much, much longer than he had anticipated. The first appellant was very worried that he might be slapped with a hefty fine because he had parked his vehicle in a no parking zone.

[28] The first appellant also stated that he had held the trolley bag for a mere few seconds only before he handed it over to the second appellant while they were walking back to the car. The second appellant confirmed the first appellant's version in this respect.

[29] Not long after, both appellants stated that they saw some customs officers and also auxiliary policemen approaching them and instructing them to cooperate with them. The first and second appellant denied that there was a struggle when the officers tried to apprehend them. Both appellants also denied that they had attempted to flee.

[30] According to both appellants, they were then brought to an inspection room by the customs officer who had detained them. In that room, a customs officer proceeded to open and ransack the black trolley bag which the second appellant had been pulling. Both denied that one of them had opened the black trolley bag.

[31] After a few minutes, a customs officer instructed both appellants to be taken out of the inspection room. The second appellant then wanted to go to the men's room and both appellants were brought there. Both appellants were brought back into the inspection room after they had returned from the men's room. PW10 then inspected the bag and found drugs. The second appellant tried to tell the arresting officer SP5 that they had mistakenly took the bag which belonged to the Chinese woman but SP5 took no action.

[32] Both appellants also stated that during their interrogation and also when their cautioned statements were recorded, no Mandarin translator was present to translate for them. Hence, they were not able to understand the questions posed to them by the customs officer.

[33] Instead, both appellants were instructed to sign some documents without knowing what those documents were or having those documents explained to them. In their worried and confused state of mind, both appellant signed the documents as instructed.

[34] Both appellants contended that the CCTV recording shown in court had not covered a "blind spot" which would have shown the presence of the Chinese woman together with them and an auxiliary policeman. A CCTV recording from the opposite direction would have revealed what actually happened.

Finding Of The Trial Judge

[35] At the conclusion of the trial, the learned trial judge found both appellants' defences had failed to rebut on a balance of probabilities, the statutory presumption of possession under s. 37(d) and also the presumption of trafficking under s. 37(da) of the Act[1]. Learned trial judge found both the appellants were guilty of the first amended charge, convicted both the appellants and sentenced them to death.

[36] Regarding the second amended charge, the learned trial judge also found both appellants failed to rebut on balance of probabilities, the presumption of possession and knowledge under s. 30(4) of the Poisons Act[2]. Both appellants were found guilty and sentence them to one year imprisonment to run from the date of their arrest.

The Appeal

[37] Although the petition of appeal contains many grounds of appeal, before us, counsels for both the appellants canvassed only three broad grounds which may be summarised as follows:

(i) the learned trial judge had erred when he invoked both presumptions under s. 37(d) and s. 37(da) at the same time;

(ii) the learned trial judge had erred when His Lordship found custody, control, knowledge and possession had been proven despite there was break in the chain of evidence and the prosecution had suppressed material evidence; and

(iii) The learned trial judge had erred when finding the appellants' defence was an afterthought.

First Issue

[38] The issue of the usage of a presumption in conjunction with another presumption ("double presumptions") was in relation to the first amended charge. When making the finding that the prosecution had established a *prima facie* case for the first amended charge against both the appellants, His Lordship relied on s. 37(d) to find both appellants had possession of the drugs. His Lordship said[3]:

> [22] The circumstances show that after SP5 asked for the said bag to be opened, the First Accused took the bag and promptly headed out of the aero mall followed by the Second Accused. Both accused then ran away before being apprehended. The circumstances show that they acted in concert. Based on the cited authorities above, I find therefore that the prosecution evidence had clearly proven as a fact that both the accused persons were in custody and control of the said bag.
>
> [23] Thus the deeming provision of the statutory presumption under s. 37(d) of the DDA of possession and knowledge of the drugs in the said bag forming the subject matter of the first charge arose against both the accused persons.

[39] After invoking s. 37(d) to find both appellants had possession of the drug, His Lordship went on to invoke s. 37(da)(xvii) of the Act to find both the appellants were trafficking in the said drug. His Lordship said[4]:

> [37] It has been proven that both accused persons were in possession of the dangerous drugs by virtue of the deeming provision in section 37(d) DDA.
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> [38] As far as the First Charge under section 39B(1)(a) of the DDA is concerned, the evidence of SP3, as has been seen, had proven that the dangerous drugs found in the said bag contained 3, 4-Methylenedioxymethamphetamine (MDMA) weighing 227.19 grams nett.
>
> [39] ...
>
> [40] I therefore find in light of the fact that the said substance 3, 4-Methylenedioxymethamphetamine (MDMA) weighed 227.19 grams nett, the statutory presumption under section 37(da)(xvii) of the DDA has arisen against both accused persons in respect of the charge under section 39B(1)(a) DDA.
>
> [41] The burden upon the accused persons is to now rebut on a balance of probability such presumption. See *PP v. Yuvaraj* (*supra*).

[40] Going through the ground of judgement, it is obvious that the learned trial judge used both presumptions to order both appellants to enter their defence. After hearing the defences, His Lordships again relied on both presumptions to convict both the appellants. We are of the view that the use of double presumptions gave rise to a real risk that both the appellants may be convicted of drug trafficking in circumstances where reasonable doubts remain[5]. Thus we find this to be a serious misdirection on the part of the trial judge which warrants an appellate intervention. However, to be fair to the learned trial judge, we feel it is important to mention here that His Lordship invoked both presumptions based on s. 37A of the Act which allowed the usage of a presumption in conjunction with another presumption before the Federal Court ruled in *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780, that s. 37A was unconstitutional for violating art. 5(1) read with art. 8(1) of the Federal Constitution.

[41] After finding that the learned trial judge had erred in using double presumptions, both in calling for defence as well as convicting the appellants, we were left with the issue of whether there were sufficient evidence, strong enough, to support the conviction of both the appellants.

[42] Reading the ground of judgment, would show that the learned trial judge found both appellants had custody and control of the said bag and had acted in concert based on the following reasons:

(i) both appellants were together at the Senai International Airport and while the second appellant who was carrying the said bag at the time, placed it on the scanning machine, it was the first appellant who after replying to a question by SP5 that the content of the bag was a hamper, immediately took the bag and headed out of the aero mall;

(ii) both appellants then exited out of the aero mall with haste and were promptly arrested. The evidence surrounding the above account came from SP5, SP6, SP7, which His Lordship found sufficient to prove that both the accused had custody and control of the said bag P27;

(iii) when SP5 asked for the said bag to be opened, the first appellant took the bag and promptly headed out of the aero mall followed by the second appellant. Both appellants then ran off before being apprehended; and

(iv) this, according to His Lordship, shows that both appellants acted in concert and thus His Lordship found that the prosecution evidence had proven that both the appellants were in custody and control of the said bag.

[43] Regarding the element of trafficking, since the learned trial judge invoked presumption under s. 37(da)(xvii) to prove trafficking, there was no specific finding of facts made by His Lordship as to which of the act under s. 2 of the Act the appellants had committed to constitute trafficking.

[44] Going through the appeal record, we find there is no evidence to prove both the appellants had acted in concert to traffic the impugned drugs as defined under s. 2 of the Act to warrant the calling of their defence for a charge of trafficking. Therefore, we are of the considered view, with respect to the trial judge, both the appellants should not have been called to enter their defence for the charge of trafficking. We found the conviction of both the appellants for trafficking is not safe. On this ground alone the conviction and sentence of both the appellants for the offence of trafficking has to be set aside.

Second Issue

[45] The second issue relates to the first as well as the second amended charge. It was submitted by both counsels for the appellants that the learned trial judge had erred when His Lordship found custody, control, knowledge and possession had been proven despite there was break in chain of evidence and the prosecution had suppressed material evidence.

[46] As we had alluded to earlier in this judgment, the learned trial judge found both the appellants had custody and control of the said bag. Thus, by invoking s. 37(d) of the Act His Lordship found both appellants had possession of the impugned drug (subject matter of the first amended charge) and by invoking s. 30(4) of the Poisons Act, both appellants had possession of the impugned poison. His Lordship found both appellants had custody and

control of the said bag based on (i) both appellants were together at the Senai International Airport; (ii) the second appellant who was carrying the said bag at the time, placed it on the scanning machine; (iii) it was the first appellant who after replying to a question by SP5 that the content of the bag was a hamper, immediately took the bag and headed out of the aero mall; (iv) both appellants were alleged to have exited out of the aero mall with haste. The evidence surrounding the above account came from SP5, SP6, SP7, and supported by CCTV recording at the airport which His Lordship found sufficient to prove that both the appellants had custody and control of the said bag P27.

[47] However, it was the appellants' case that the said bag P27 did not belong to the appellants and they did not know its content. Their version of the event was that at the material time the second appellant with the help of the first appellant had passed bags belonging to the second appellant through the baggage scanning machine. At that point in time, there was a Chinese woman who was standing in front of them and was in conversation with the auxiliary police on duty at the scanner. The Chinese woman had two black bags with her. One of which was placed in the scanner while the other was checked by the auxiliary police. While waiting for the luggage to come out of the scanner, the second appellant received a telephone call and walked away from the scanner. The second appellant, while on the phone, signalled the first appellant to take the bag from the scanner. As the two black bags came out of the scanner and only one bag belonged to the second appellant, the first appellant then picked up the black bag and proceeded towards the main entrance together with the second appellant. The first appellant was worried that he might have been issued with a traffic summons. While they were on their way to the first appellant's car, they noticed a few men running towards them. Both appellants were then arrested and taken into the customs examination room. They did not resist the arrest and provided full cooperation at all times. The said black bag was then inspected and was found to contain suspected drugs. When the appellants realised they had picked up a wrong bag which probably belonged to the Chinese woman, they informed this to SP5 but SP5 did not take any action.

[48] It was also the appellants' case that the whole incident would be revealed if the whole CCTV was produced in court instead of only for the duration of two minutes which was from 4.06pm to 4.08pm. This footage of the CCTV tendered by the prosecution merely showed the second appellant entering with a black trolley bag with him while the first appellant did not carry any bag. Both appellants were seen approaching the baggage scanner. Moments later the first appellant was seen carrying an identical black trolley bag heading back to the main entrance.

[49] Going through the notes of proceedings, it is apparent to us that right from the very start the importance of the CCTV footage was highlighted by the defence. Based on the letter by the customs dated 27 May 2016 addressee

to the Assistant & General Manager AVSEC & AFRS of the Senai Airport Terminal Services Sdn Bhd, the CCTV footage requested was for the duration within 3pm to 4.30pm on 24 May 2016[6]. However, the footage played during the course of the trial was only for the duration of two minutes which was from 4.06pm to 4.08pm. Upon receipt of the CD (P38), the investigating officer, Gerry Ho ("SP12") claimed to have considered the entire CCTV footage but only took into account two minutes of the video contending that there were no significant events that took place[7].

[50] However, SP12 seemed to have contradicted himself during cross-examination when he later agreed with the defence counsel that if the footage of the incidents which took place one minute earlier was obtained, the whole scenario would have been made clearer[8]. As such we are constrained to agree with learned counsel for the appellants that if the full duration of the CCTV recording was produced, it may show there was indeed the Chinese woman who had placed her bags on the scanner. The omission of the relevant part of the CCTV footage showing the existence (or absence) of a Chinese woman placing a black bag at the scene is material and the omission prejudiced the case for the defence. If CCTV was produced, it may show that the appellants had indeed mistakenly taken a wrong bag (probably belonging to the Chinese woman) from the scanner and did not have any knowledge of its content. This would rebut any presumption of possession of the impugned drug as well as the poison.

[51] Furthermore, based on the evidence of SP5, SP6, SP7, SP8 and SP9, on which the learned trial judge relied on, both the appellants walked hastily towards the exit, resisted arrest and were uncooperative. And according to Gunasegaran, the Head of Security of Senai Airport ("SP11"), there were 43 cameras fixed at the main areas which include static cameras and rotating PTZ. In this circumstance, if the prosecution wishes the court to accept the prosecution's version that both accused were walking hastily towards the exit and resisted arrest, it would be reasonable to expect such CCTV footage showing the said arrest was tendered by the prosecution. Tendering the CCTV footage showing the arrest would have easily rebutted the defence version that there was no resistance or attempt to flee by both the appellants.

[52] It was further argued that the learned trial judge had erred when His Lordship found custody, control and possession was established when the evidence showed there was a break in the chain of evidence pertaining to the drug exhibit as well as the poison.

[53] Regarding this issue, the learned trial judge wrote in his ground:

> ... The evidence revealed that at all material times the accused persons as well as the exhibits were under the charge and care of SP7 and SP9 before they were handed over to SP10. This is evident from the testimony of SP10 who said that when he and Desmond Tero (SP2) arrived at the Pejabat Cawangan Pemeriksaan Penumpang (CPP) Senai he saw three bags including the said bag branded "Lotus Master"...

> ... I was satisfied therefore that there was no fatal break in the chain of exhibits ...

And we find no reason to interfere with His Lordship's finding on the issue of chain of evidence pertaining to the exhibits tendered. The available evidence support the finding of the learned trial judge that there was no break in the chain of evidence of the exhibits. All the relevant witnesses had identified the exhibits based on the marking found on them.

Third Issue

[54] The third issue raised by the second appellant was regarding the alleged finding by the learned trial judge that the defence was an afterthought. We had scrutinised the ground of judgment written by the learned trial judge and found the learned trial judge had meticulously analysed the defence put forward by the defence. However when came to the crux of the defence case, namely that they had taken a bag belonging to a Chinese woman by mistake, His Lordship said no "*Alcontara* notice" was given and concluded that the suggestion that the said bag belonged to the Chinese woman was conveniently created by the accused merely to exculpate themselves from the precarious position they found themselves in and the defence was an afterthought. His Lordship then went on to find the defence had failed to rebut on balance of probabilities, both the statutory presumptions under the Act. Hence both appellants were found guilty for the first amended charge. His Lordship also found on balance of probability the appellants failed to rebut presumption of possession under s. 30(4) of the Poisons Act. Hence, both were found guilty for the second amended charge[9].

[55] The "*Alcontara* notice" so described after the case which bears its name, is the furnishing of details in support of an accused's defence which is normally given in his or her cautioned statement. It must be borne in mind however, that this may or may not involve the actual tendering of the cautioned statement itself in evidence.

[56] Once such a notice is given, investigation must be carried out on the disclosure given and the onus is then shifted to the prosecution to rebut the "*Alcontara* notice". The shifting of the burden however, to the prosecution after the giving of the "*Alcontara* notice", as of necessity pre-supposes that sufficient particulars or reasonable details are furnished in order for the investigation officer to carry out a meaningful investigation.

[57] Once such disclosure is made, it is then incumbent upon the prosecution to check the veracity of the facts disclosed and to negate the facts disclosed. It was held in *Chan King Yu v. PP* [2009] 1 CLJ 601:

> [78] As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh. D29 which was made on the day after his arrest, I am of the view that the police had all the time to check as to their veracity. The

> burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement. (See the case of ***Alcontara Ambross Anthony v. PP*** (*supra*)). (emphasis added)

[58] Reverting to this case, when the appellants informed SP5 that they had picked up a wrong bag which probably belong to the Chinese woman which was in the same que with them at the scanner machine, we are of the considered view sufficient notice had been given to enable the investigating officer to investigate the veracity of the defence. In fact, it was quite simple for the investigating officer to do so. He had in fact, already partially done so by obtaining the CCTV recording. Unfortunate, for reasons only known to him, he had deemed it fit to leave out the crucial moments in the CCTV recording which could have either rebut or support the defence. The full duration of the CCTV recording would reveal that the Chinese woman either really exist or merely the appellants' creation. The defence version cannot therefore be justifiably characterised or dismissed as an afterthought.

Conclusion

[59] Based on the reasons stated above, we find there are merits in the appeal by both the appellants. We find it is not safe to convict both the appellants for any of the charges. Hence, we unanimously allow the appeal by both the appellants. The convictions and sentences imposed by the learned High Court Judge are set aside and we order both the appellants be acquitted and discharged from both charges.

Endnotes:

1. paragraph 149 of ground of judgment at p. 59, appeal record vol. 1
2. paragraph 150 of ground of judgment at p. 59, appeal record vol. 2
3. see paras. 22 and 23 of ground of judgment at p. 27, appeal record vol. 1
4. paragraphs 37 to 41, ground of judgment in appeal record, vol. 1
5. *Muhamed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273
6. see p. 1045, vol. 3, appeal record
7. see SP12's cross-examination at p. 743, vol. 2(3)
8. see SP12's cross-examination at p. 745, vol. 2(3)
9. see *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209.